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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

LUCIUS TETER ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Reconstruction Finance Corporation, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on January 4, 1941, affirming the decree of the District Court which dismissed petitioner's amended complaint and quashed the summons issued against the C. T. C. Investment Company, named as a defendant to the amended complaint.

OPINIONS BELOW

There is no written or printed opinion of the District Court. The opinion of the Circuit Court of Appeals (R. 204–221) is reported in 117 F. (2d) 716.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on January 4, 1941 (R. 222). A petition for rehearing was filed on January 20, 1941, and denied on February 26, 1941 (R. 223). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner as a creditor brought suit to recover against the assets of a dissolved corporation which had passed into the possession of a former officer for administration and liquidation. The principal question presented is whether under Illinois law a court of equity may administer those assets as a trust fund for the benefit of creditors or whether such relief, long recognized by Illinois decisions, is precluded or limited by the provisions of certain Illinois statutes which prescribe a procedure, during a specified period after dissolution, for rights against the corporation, its officers, and stockholders.[1]

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[1] In addition to the above question there is the further question of whether the Circuit Court of Appeals erred in holding that the action failed as a representative suit because of petitioner's failure to allege that the stockholders of the C. T. C. Investment Company were so numerous as to make it impracticable to join them (R. 218). In the argument on the merits, if the petition is granted, petitioner will urge that the admission made in the brief filed in the Circuit Court of Appeals by one group of the respondents that there are

STATUTES INVOLVED

The statutes directly involved are Sections 14, 53, and 79 of the 1919 Illinois Corporation Act, and Section 49 of the Illinois Chancery Act. These sections are set out in the Appendix, *infra*, pp. 13–15. Indirectly involved are similar or identical sections of prior and subsequent acts. These sections are also set out in the Appendix, *infra*, pp. 15–19.

STATEMENT

In 1932 petitioner lent $90,000,000 to the Central Republic Bank and Trust Company of Chicago, Illinois, in order to enable the bank to meet persistent runs by its depositors (R. 57, 121).[2] To secure the loan, the bank pledged to petitioner, among other collateral, certain notes, the payment of which was guaranteed by the C. T. C. Investment Company (R. 122–123).

The C. T. C. Investment Company, an Illinois corporation, was incorporated in June 1929 (R.

"hundreds of stockholders" is binding upon respondents and makes unnecessary the missing allegation. This ruling of the court below, even if correct, does not dispose of the principal questions. Even if the action fails as a representative suit, it is good as against the defendants actually joined. It is not necessary to join all of the stockholders. *Hill* v. *Gruell*, 42 Ill. App. 411, 420, 421; *Singer* v. *Hutchinson*, 183 Ill. 606, 618, 620; *Clapp* v. *Peterson*, 104 Ill. 26, 35; *Edwards* v. *Schillinger*, 245 Ill. 231, 244; *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 603, 604.

[2] See also *Reconstruction Finance Corporation Seven-Year Report to the President and the Congress of the United States*, dated February 2, 1939, p. 4.

180), and dissolved on May 20, 1933 by decree of the Superior Court of Cook County, Illinois, for failure to file annual reports and pay its franchise taxes (R. 125, 181). Dissolution was effected by a bill brought in that court by the People on the relation of the Attorney General, to which the Company was the sole defendant. The decree entered merely ordered the Company's dissolution, and made no provision for the liquidation and distribution of its assets among its creditors (R. 179–181).

At the time of its dissolution, the Company had assets consisting largely of notes, bonds, and securities (R. 125), including an agreement of indemnity running to it and executed by certain individuals who were also stockholders of the Company (R. 125, 159). Its remaining assets, which are substantial, are being administered in the name of C. T. C. Investment Company by one Joseph Duner, a former officer of the Company (R. 125).

The C. T. C. Investment Company continued to act as a corporation long after its dissolution. In 1938 it sued the United States for a refund of certain taxes. See *C. T. C. Inv. Co.* v. *United States,* 108 F. (2d) 383 (C. C. A. 7th). Subsequently it sued an indemnity company on a certain guaranty allegedly executed by the defendant company. *C. T. C. Inv. Co.* v. *London & Lancashire Indemnity Co.,* 116 F. (2d) 741 (C. C. A.

7th). In both of these cases the C. T. C. Investment Company sued as a corporation, and in both cases it was alleged under oath that the C. T. C. Investment Company was a corporation organized and existing under the laws of the State of Illinois.

In 1939 to recover upon the guaranties of the aforesaid notes pledged by the bank (R. 126–127), on which there remained unpaid the principal sum of $1,112,420.97, together with interest (R. 124), petitioner filed suit in the District Court (R. 2, 110). Among the defendants named were the C. T. C. Investment Company and Joseph Duner, and the individuals who executed the indemnity agreement referred to above (R. 2, 3, 110).

Motions to dismiss the amended complaint and to quash the summons issued against the C. T. C. Investment Company were sustained, and the summons was quashed and the amended complaint dismissed (R. 192–193). The Circuit Court of Appeals affirmed (R. 204–222).

REASONS FOR GRANTING THE WRIT

1. The decision below seems in flat contradiction of the Illinois law that the assets of a dissolved corporation are a trust fund for the benefit of creditors and stockholders. The court stated "that in the earlier years of our jurisprudence considerable loose language was used with respect to trusts in cases such as this" (R. 215). The court, however, found that the later decisions of this Court in *Hollins* v. *Brierfield Coal and Iron*

Co., 150 U. S. 371, and *Smith* v. *Railroad Company,* 99 U. S. 398, so modified the trust fund doctrine that it could no longer be used to preserve the rights of creditors. It held that "these decisions are controlling" (R. 217).[3] Whatever the application of those decisions to a case such as this,[4] we had thought it settled that a Circuit Court of Appeals must seek its authorities from the state court and not from this Court when the question is the rights of creditors of a dissolved corporation. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202. The failure of the court below to ascertain and apply the law of Illinois warrants review by this Court.

2. It is the rule in Illinois that upon the dissolution of a corporation its assets become a "trust

[3] Buried in nine paragraphs of discussion and quotation from the decisions of this Court (R. 215–217) is a "see also" citation of two Illinois decisions (R. 217). Apart from the fact that these cases were misinterpreted (*infra,* p. 7), it seems evident that the court below paid only perfunctory attention to the Illinois cases.

[4] Neither of the cases dealt with a dissolved corporation, and in neither of them was the Court concerned with the question of reaching assets which had passed to the stockholders or others upon dissolution. In both of them, the Court merely held that a simple contract creditor could not maintain an action to reach his corporate debtor's assets without first securing a judgment, or at least, a lien. Such a question is basically different from that of reaching assets of which the corporation has become divested by dissolution, and which have passed upon dissolution to the stockholders or others as transferees of the corporation.

fund" to be administered, first, for the benefit of creditors, and, second, for the benefit of stockholders. Recovery on such basis was allowed in *Hill* v. *Gruell*, 42 Ill. App. 411; *Singer* v. *Hutchinson*, 183 Ill. 606; and *Clarkson* v. *E. & N. S. Dispatch*, 6 Ill. App. 284. See also *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204; *Tarbell* v. *Page*, 24 Ill. 46, 47; *Life Association of America* v. *Fassett*, 102 Ill. 315, 323; *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 348, 350, 351; *Clapp* v. *Peterson*, 104 Ill. 26, 31, 32, 34; *Henry* v. *Jewett*, 94 Ill. App. 667, 669, 670. The doctrine has never been denied or repudiated by the Illinois courts.

The court below cited *Gottlieb* v. *Miller*, 154 Ill. 44, and *Johnson* v. *Canfield-Swigart Co.*, 292 Ill. 101. Neither of those cases denied the doctrine, but on the contrary expressly recognized it.[5]

The contrary decision of the court below that Sections 14, 53, and 79 of the 1919 Illinois Cor-

[5] *Gottlieb* v. *Miller* involved an insolvent and not a dissolved corporation. The contest was not between creditors and stockholders; it was among the creditors themselves. The court merely held that the "trust fund" doctrine did not prohibit an insolvent corporation from preferring one creditor over another. *Johnson* v. *Canfield-Swigart Co.* also involved an insolvent, not a dissolved, corporation. The court held that a sale of "all the capital and assets of the corporation and a division thereof among the stockholders after the payment of all debts due the stockholders from the corporation and without payment of the other debts owed by it" was fraudulent as to its other creditors. The court expressly recognized the "trust fund" doctrine, but held that upon the facts fraud was the proper ground of recovery.

poration Act and Section 49 of the Chancery Act,[6] all *infra,* provide an exclusive method is a serious inroad on the rights afforded creditors of Illinois corporations, particularly since dissolution can take place in Illinois without a judicial liquidation and distribution of the corporation's assets,[7] and without notice to creditors or other interested parties by publication or otherwise.

It seems plain, both on principle and under the Illinois decisions, that the statutory rights of creditors of a dissolved corporation are not exclusive. In substance, Section 14 extended the corporate capacity for two years after dissolution; Section 53 provided that upon dissolution any creditor could bring suit against all persons liable for the corporation's debts by joining the corporation in such suit; Section 79 provided that dissolution should not take away any remedy against a corporation, its officers or stockholders, for any liability incurred prior to dissolution if suit should be brought and service had within two years after

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[6] Although this case arises under the 1919 Illinois Corporation Act, the relevant provisions of that Act have been carried forward in the 1933 Act which is the Act presently in force. The relevant sections of both Acts are set out in the Appendix, *infra.*

[7] This is true under both the 1919 and 1933 Acts. Ill. Rev. Stat. 1931, Ch. 32, Secs. 118–124; Ill. Rev. Stat. 1939, Ch. 32, Secs. 82–86, 94, Par. 157.82–86, 157.94.

The C. T. C. Investment Company was dissolved without notice to creditors and there has not been a judicial liquidation and distribution of its assets among its creditors (*supra,* p. 4).

dissolution; and Section 49 of the Chancery Act provided that a judgment creditor with execution returned unsatisfied could bring suit to reach the judgment defendant's assets by joining the judgment defendant as a party to such suit.

Hill v. *Gruell,* 42 Ill. App. 411, specifically held that the statutes were not exclusive.[8] That case involved an action upon the "trust fund" doctrine by a creditor against the stockholders of a dissolved Illinois corporation to recover the assets they had received or the value thereof. The court, in overruling objections that the plaintiff had failed to comply with many of the applicable statutory provisions, said (p. 418) that the objections were based on a misapprehension of the character of the suit, and further said (p. 419):

> It can hardly be necessary to cite authority for the proposition that corporations are trustees of their assets primarily for their creditors; that the right of stockholders, upon a dissolution, is limited to their proportionate shares of the assets remaining after the payment of all the corporate debts; that of whatever they receive on distribution before such payment, they thereby become like trustees; that a creditor may charge as

[8] At the time of the decision (1891) and at the time the suit arose (1878), there were in force Section 49 of the Chancery Act and sections practically identical to Sections 14, 53, and 79 of the 1919 Illinois Corporation Act, except that no time was prescribed for suits against the corporation, its officers and stockholders, after dissolution.

> such any or all into whose hands he can trace assets so distributed; that a creditor, for that purpose, is anyone who has a valid claim against the corporation arising on contract express or implied, whether legal or equitable, a lien or not a lien, due or becoming due, ascertained or to be ascertained; and that a court of equity in this State has power as such and independent of statute, to enforce that trust according to its practice in like cases.

The rule of *Hill* v. *Gruell* has not been qualified and is reinforced by other Illinois decisions holding that Section 49 of the Chancery Act is not exclusive. *Eads* v. *Mason,* 16 Ill. App. 545, 547, 548; *Steere* v. *Hoagland,* 39 Ill. 264, 265–267; *McDowell* v. *Cochran,* 11 Ill. 31, 33; *Blair* v. *Illinois Steel Co.,* 159 Ill. 350, 358–360.[9] The rule is the same in other jurisdictions.[10]

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[9] It is the rule in Illinois that a statute giving a new right or a right equivalent to one already existing in equity does not bar the existing equitable right unless the statute contains language restrictive or prohibitory of the further continuance of the equitable right. *Ill. Life Ins. Co.* v. *Chicago*, 244 Ill. App. 185, 199, 200; *Hesse* v. *Voss*, 52 Ill. 472, 476, 477; *Labadie* v. *Hewitt*, 85 Ill. 341, 342, 343; *Wilson* v. *Illinois Trust and Savings Bank*, 166 Ill. 9, 13, 14; *McNab* v. *Heald*, 41 Ill. 326, 330–332; *Grimes* v. *Hilliary*, 38 Ill. App. 246, 247, 248. Cf. *Shippert* v. *Shippert*, 371 Ill. 267, 270, 271, and *Chapman* v. *American Surety Co.*, 261 Ill. 594, 602–606.

[10] *State and Watson, Trustee,* v. *Bank of Tennessee*, 64 Tenn. (5 Baxt.) 101, 107–114; *Lindemann* v. *Rusk*, 125 Wis. 210, 229–232; *State ex rel. Pabst* v. *Circuit Court*, 184 Wis. 301, 307; *Chatham* v. *Mecklenburg Realty Co.*, 180 N. C. 500, 502, 503; *Howe* v. *Robinson*, 20 Fla. 352, 355–357. The Cir-

The only statutory change of substance since the decision in *Hill* v. *Gruell* is the provision of a two-year period of limitation.[11] This is entirely irrelevant to the independent existence of the "trust fund" doctrine in Illinois. Indeed, by limiting the life of the statutory rights against the assets, officers and stockholders of a corporation dissolved without notice to creditors, it reinforced the need for equitable relief.

The statutes have no bearing on such a suit as was filed in the instant case. When Section 79 refers to the liabilities of officers and stockholders it would seem only to mean their statutory liabilities. Cf. *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405. Furthermore, the action here (like that in *Hill* v. *Gruell, supra*) is not one for

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cuit Court of Appeals apparently believed that it could not consider the above decisions. But, if *Hill* v. *Gruell* and the cases cited in the text and in note 9 be disregarded, and the Illinois courts considered silent on the question, the Federal court should decide it upon the basis of the general law. *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), certiorari denied, 308 U. S. 572; *De Long* v. *Jefferson Standard Life Ins. Co.*, 109 F. (2d) 585, 586 (C. C. A. 5th), certiorari denied, 310 U. S. 635; *New York Life Ins. Co.* v. *Jackson*, 98 F. (2d) 950, 952 (C. C. A. 7th), certiorari denied, 305 U. S. 640. Certainly, the refusal of the court below to look beyond the Illinois decisions is hard to square with its almost exclusive reliance upon the decisions of this Court.

[11] Compare Section 3 of Act approved March 24, 1869 (Public Laws of Illinois, 1869, p. 1), Hurd's Ill. Rev. Stat. 1917, Ch. 32, Sec. 12, with Cahill's Ill. Rev. Stat. 1931, Ch. 32, Sec. 79, Ill. Rev. Stat. 1939, Ch. 32, Sec. 94, Par. 157.94.

personal judgment against the stockholders as such, but is against them and Duner for the purpose of recovering assets of the corporation. As was succinctly stated by the court, in *Hill* v. *Gruell, supra,* at p. 419:

> It [the bill] seeks to charge the defendants, not as stockholders, but as trustees, though that character was assumed by their action as stockholders.

To construe the statute otherwise would lead to the incongruous result that while suits against the officers and stockholders, as transferees, would be barred after two years, yet suits against other transferees would not be so barred.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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MAY 1941.